

**BEFORE THE APPEALS BOARD**

**KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DAVID ABEYTA</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 261,783
	)	
<b>SCOTT MASONRY, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>TIG INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requests Appeals Board review of Administrative Law Judge Brad E. Avery's February 28, 2001, preliminary hearing Order for Compensation.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant suffered an accidental injury while working for respondent and claimant provided respondent with timely notice of the accident. The ALJ ordered respondent to pay temporary total disability compensation, provide claimant with medical treatment through Craig J. Vosburgh, M.D. and pay the past medical treatment expenses admitted into evidence at the preliminary hearing.

On appeal, respondent contends claimant failed to prove his left shoulder rotator cuff tear was the result of an accident that arose out of and in the course of his employment with respondent. Respondent argues the better explanation for claimant's left shoulder injury is a fall claimant suffered on February 24, 2000, while he was on his way to work. Respondent contends this fall occurred on a public sidewalk not located on respondent's premises or under respondent's control. In respondent's Application for Review, respondent also requested Appeals Board (Board) review of the timely notice issue but did not argue that issue in its brief.

Claimant, on the other hand, contends he proved through his testimony and the medical treatment records admitted at the preliminary hearing that he suffered a left shoulder injury while working for the respondent. Thus, claimant requests the Board to affirm the ALJ's preliminary hearing Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Board makes the following findings and conclusions:

On February 24, 2000, claimant was employed by the respondent as a bricklayer when he fell down some sidewalk stairs on his way to the job site. This accident occurred in Lawrence, Kansas, at or near the Kansas University campus, where respondent was a subcontractor building a fraternity house.

The claimant described his injuries as bruises on both arms and his back. But the injuries were not severe enough for claimant to seek medical treatment.

Claimant testified that sometime around the middle of March 2000, he was involved in another accident at work. Claimant was working approximately 18 feet above ground on scaffolding when one of the outriggers that held the 16 foot planks claimant was standing on slipped off its jack. As a result, claimant fell, but caught himself by spreading his arms and legs out. With the assistance of a fellow employee, claimant was able to climb back onto the scaffolding. At that time, claimant was shook up but was able to continue to work and finished the rest of the work day.

But a couple of weeks after the scaffolding accident, claimant started having problems with his left shoulder at work. Claimant testified that before he fell from the scaffolding he had not had any symptoms or problems with his left shoulder. As claimant continued to work, his left shoulder worsened. Around August 1, 2000, claimant notified respondent's owner that his left shoulder was hurting while he was working and he needed medical treatment. The owner, however, told claimant that he wanted him to use his private health insurance coverage through the union contract instead of making a workers compensation claim. The owner expressed the concern that his workers compensation insurance rates were already high and if a claim was made then the rates would further increase.

On August 7, 2000, claimant sought medical treatment for his left shoulder at Minor Med, Inc. in Topeka, Kansas. Claimant provided a history of using his arms to catch himself from falling while at work in the spring of 2000. The Minor Med physician examined claimant and his initial assessment was left shoulder impingement syndrome. Claimant was then referred to see Dr. Vosburgh.

Claimant first saw Dr. Vosburgh on August 14, 2000. Claimant provided Dr. Vosburgh with a history of falling off scaffolding at work and a week later falling again at work. Dr. Vosburgh's diagnostic impression was left shoulder strain with ongoing tendinitis. After an MRI examination, Dr. Vosburgh's diagnosis was rotator cuff tendinitis with a

possible partial thickness tear. At that time, claimant elected to proceed with diagnostic arthroscopy and decompression. Dr. Vosburgh took claimant off work on September 13, 2000. On September 29, 2000, Dr. Vosburgh performed an arthroscopic decompression and repaired a partial rotator cuff tear of claimant's left shoulder. After a recovery period consisting of physical therapy and home exercises, claimant was returned to light duty work on January 10, 2001.

Respondent returned claimant for a short period of time to light work of cleaning walls with only his right arm. Then respondent ran out of the light work and claimant was returned to his regular bricklaying job. The bricklaying job duties caused claimant's left arm and shoulder to worsen. Claimant returned to see Dr. Vosburgh on February 12, 2001. Because claimant's work duties resulted in claimant's left shoulder worsening, Dr. Vosburgh took claimant off work until March 1, 2001.

The respondent had its mason foreman, Randy Merillat, testify at the preliminary hearing. Mr. Merillat verified that claimant had two accidents while working for the respondent in the early spring of 2000. Mr. Merillat testified that claimant fell from the scaffolding on February 14, 2000, and then fell on the stairs on the way to work on February 24, 2000. Mr. Merillat testified that, after the scaffolding fall, claimant did not complain of an injury but after the fall on the stairs claimant's right arm was severely bruised. Mr. Merillat also testified, that after the scaffolding fall, claimant was able to finish work that day. But after the fall on the stairs claimant was unable to work and went home. Mr. Merillat testified claimant only worked for him for some six hours in March 2000 and claimant would have had to work for another crew if he continued to work for the respondent until September 2000.

Respondent argues the better explanation for the accident that caused claimant to suffer a left shoulder rotator cuff tear is the fall down the stairs on the way to work and not the fall from the scaffolding. Respondent points out that the evidence establishes that the claimant suffered the most trauma and the more severe injuries during the fall from the stairs. Respondent asserts that claimant's own testimony establishes that after the scaffolding fall he was able to continue to work and he did not have any left shoulder symptoms for another two weeks. This would then place claimant at the approximate date when he suffered injuries from the stair fall. Thus, respondent argues the stair fall occurred while claimant was on his way to work and not on respondent's premises and, therefore, is not compensable.<sup>1</sup>

In a worker's compensation case, it is not essential or necessary to have medical evidence to establish the existence, nature and extent of a worker's injury. Claimant's

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<sup>1</sup> See K.S.A. 44-508(f).

testimony alone is sufficient to prove those facts.<sup>2</sup> Also, a preexisting condition aggravated and made worse by the worker's usual work tasks is a compensable injury.<sup>3</sup>

The Board finds that the ALJ's conclusion, at this juncture of the proceeding, that claimant proved he injured his left shoulder while working for the respondent should be affirmed. The Board finds claimant's testimony supports the conclusion that whether claimant injured his left shoulder in the stair fall or the scaffolding fall, he continued to work laying bricks from March through September 13, 2000, and those usual work duties continued to aggravate and worsen his left shoulder injury until he was taken off work by Dr. Vosburgh.

As noted above, the respondent also raised the timely notice issue but did not argue the issue in its brief. The preliminary hearing record, however, establishes that claimant provided respondent with timely notice of both the scaffolding fall and the stair fall through its foreman. Also, as a result of his work duties claimant notified respondent's owner in August 2000, that his left shoulder had worsened and he needed medical treatment.

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Brad E. Avery's February 28, 2001, Order for Compensation, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2001.

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BOARD MEMBER

c: John J. Bryan, Topeka, Kansas  
Geoffrey Clark, Overland Park, Kansas  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director

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<sup>2</sup> See Graff v. Transworld Airlines, 267 Kan. 854, 864, 983 P. 2d 258 (1999).

<sup>3</sup> See Demars v. Rickel Manufacturing, Corporation, 223 Kan. 374, 379, 573 P.2d 1036 (1978).